Supreme Court, U.S.
FILED
JUL 28 1992
OFFICE OF THE CLERK

(2)

No. 92-0068

In The

Supreme Court of the United States

October Term, 1992

STONECRAFTERS, LTD. AND JOHN W. KRONBERG,

vs.

Petitioners,

NORWEST EQUIPMENT FINANCE, INC.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Connecticut

RESPONDENT'S BRIEF IN OPPOSITION

JONATHAN J. EINHORN
EINHORN, BERNBLUM & GREENBERG
Attorneys for Respondent
412 Orange Street
New Haven, Connecticut 06511
(203) 777-3777

2346
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

8

TABLE OF CONTENTS

Page

Counter Statement of the Case 1

Reasons for Denying the Writ 3

Certiorari is not appropriate in this case. 3

Conclusion 6

TABLE OF CITATIONS

Cases Cited:

Connecticut v. Doehr, 111 S. Ct. 2105 (1991) 3, 5

Shawmut Bank, N.A. v. Valley Farms, 222 Conn. 361 (1992) 4, 5

Statutes Cited:

Conn. Gen. Stat. § 52-278a et seq. 2

Conn. Gen. Stat. § 52-515 4

No. 92-0068

In The

Supreme Court of the United States

October Term, 1992

STONECRAFTERS, LTD. AND JOHN W. KRONBERG,

Petitioners,

vs.

NORWEST EQUIPMENT FINANCE, INC.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Connecticut

RESPONDENT'S BRIEF IN OPPOSITION

COUNTER STATEMENT OF THE CASE

Upon the default of the defendants Stonecrafters, Ltd., John W. Kronberg and John A. Tomlinson on an equipment lease for an industrial stonecutter, the plaintiff lessor brought this replevin action in Connecticut Superior Court, seeking its return.

Pursuant to § 52-278a *et seq.*, Conn. Gen. Stat., such an action is begun by a prejudgment remedy. Contrary to the implications in petitioners' Statement of the Case, a fully contested hearing on this issue was held on August 12, 1991 After the hearing, with all parties present, and evidence taken, the court found in favor of the respondent, and the prejudgment remedy application for a replevin was granted, upon the posting of a bond with commercial surety in the amount of $60,000.

On the day of the hearing, the defendants filed a motion to dismiss claiming noncompliance with the replevin statutes, and that the bond set by the court was inadequate, which motion was denied. With regard to the amount of the bond, the court heard respondent's testimony as to the value of the stonecutter, and defendant's testimony as to alleged "damages" which would be suffered if the machine were replevied. The court chose to accept respondent's testimony and set the bond at $60,000; twice the value it found of the stonecutter.

The equipment in question is a large commercial stonecutter, which is attached to the floor and wired for use. No dispute was made by defendants that they were in default under the equipment lease and no expert testimony was offered by defendants to contradict respondent's valuation of the equipment.

After hearing witnesses for both respondent and defendants, the court found that the respondent had satisfied its standard of proof for prejudgment remedy applications, finding that there was probable cause to sustain the validity of respondent's claim.

Thereupon followed a host of appeals by defendants. The defendants appealed to the Connecticut Appellate Court, which on March 3, 1992 affirmed the trial court, without written opinion. The issue of the constitutionality of the replevin statute was not

raised in oral argument and only in a brief reference in a reply brief.

The defendants then petitioned for certification to the Connecticut Supreme Court, which denied certification on April 9, 1992 also without opinion.

Petitioners' argument throughout the hearing and the appeals has been essentially that the trial court reached an erroneous conclusion in finding probable cause to issue a prejudgment remedy, and in setting the amount of the bond. Petitioners have yet to raise any objection as to the procedural due process afforded them at the hearing. This was a case of disputed allegations as the title of the stonecutter, and the court determined that title belonged to the respondent. This appeal stems from petitioners' dissatisfaction with that factual result.

REASON FOR DENYING THE WRIT

Certiorari is not appropriate in this case.

Petitioners basically claim that certiorari should be granted, based upon this Court's due process requirements for prejudgment remedy applications in *Connecticut v. Doehr,* 111 S. Ct. 2105 (1991).

That case and its holding are wholly inapplicable to this appeal. *Doehr* held a former provision of Connecticut's prejudgment remedy statute unconstitutional, which allowed for an *ex parte* attachment of real estate. In that assault case, a real estate attachment was granted without a prior hearing or notice. That case concerned itself with procedural due process and found Connecticut's former pre-judgment remedy statute lacking. *Id.* at 2111. Such is absolutely not the case here.

Here, a full and contested hearing was held in open court at which the parties appeared, argued, presented evidence and called witnesses. There was nothing *ex parte* about the process. After the hearing, the court found probable cause to grant respondent a prejudgment remedy (by replevin), of a commercial stonecutter. Petitioners' only real complaint is that it was unsucessful.

Petitioners make no claim that the replevin statute (§ 52-515, Conn. Gen. Stat.) is unconstitutional, or that its procedures deprive it of due process. Petitioners' only claim is that the trial court erred in finding that the respondent complied with certain statutory requirements.

In its petition, pages 12 and 13, petitioners erroneously indicate that the court allowed the respondent to proceed without a determination of title. This is incorrect. The court heard evidence on whether or not respondent had title, but did not agree with petitioners' position. The issue was fully explored at trial.

In fact, at pages 13 and 14 of the petition, the petitioners recite the conflicting evidence of title of the stonecutter, which was presented to the court, and which contradicts its position that the court ignored the issue. It must also be noted that (a) petitioner never claimed it had title, only that a third party and not respondent held the same, a claim it was unable to prove; (b) this is a commercial transaction, not a consumer transaction; and (c) the petitioners never denied being in default under its lease to respondent.

The petitioners also misstate the holding of *Shawmut Bank, N.A. v. Valley Farms,* 222 Conn. 361 (1992). At page 9 of the petition, petitioners state:

In rendering a decision, Judge Borden observed

> that the issue was not whether or not the Connecticut replevin statutes were unconstitutional on their face (*because they were unconstitutional, Shawmut Bank N.A. v. Valley Farm, et al.*, supra at p. 372).

(Emphasis added).

Such a statement is incorrect. Nowhere in *Shawmut* does the court indicate that the Connecticut replevin statute is unconstitutional. If anything, *Shawmut* includes an excellent dissertation on why Connecticut's statute withstands any *Doehr* related challenge.

> This case is distinguishable from *Doehr*. Here, there was no ex parte deprivation. The replevin order did not issue until after the defendants had a full opportunity for an evidentiary hearing. Furthermore, unlike the situation in *Doehr*, in this case the probable cause standard was constitutionally sufficient because the facts at issue, namely the existence of the debt and whether it was in default, were "ordinarily uncomplicated matters that lend themselves to documentary proof." Id., 2114, quoting *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 609, 94 S. Ct. 1895, 40 L. Ed. 2d 406 (1974). Therefore, "the risk of error was minimal . . ." *Connecticut v. Doehr*, supra, 2115; see also *Union Trust Co. v. Heggelund*, supra. Finally, unlike the situtation in *Doehr*, where the (p)laintiff had no existing interest in (the defendant's) real estate when he sought the attachment, *Connecticut v. Doehr*, supra; in this case the plaintiff had a preexisting security interest in the property sought to be replevied.

A trial court making a finding of title contrary to the arguments of the petitioners does not raise constitutional issues. Petitioners' objections to the trial court's findings of fact have been fully litigated in state court.

CONCLUSION

This is clearly not a matter appropriate for review by this Court, and certiorari ought to be denied.

Respectfully submitted,

JONATHAN J. EINHORN
EINHORN, BERNBLUM &
GREENBERG
Attorneys for Respondent